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No. 79-1636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM W. WINPISINGER, *et al., Petitioners,*

v.

JACK WATSON, *et al., Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC. IN OPPOSITION

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OPINIONS BELOW

Neither the opinion of the court of appeals nor that of the district court has yet been reported. References herein to those opinions are made to the appendices to the Petition for Certiorari wherein they are set forth.

JURISDICTION

Petitioners have invoked jurisdiction under 28 U.S.C. § 1254(1) with respect to the judgment of the court of appeals rendered April 10, 1980.

QUESTION PRESENTED

Do petitioners claiming that respondents' alleged activities devalue and dilute their efforts in support of Senator Edward M. Kennedy's campaign for the Democratic Presidential nomination suffer the specific,

concrete injury that is fairly traceable to respondents' acts required for constitutional standing, and present a case that is appropriate for court resolution within the prudential confines of judicial self-governance?

STATEMENT

Although hardly discernible from the Petition for Certiorari, this case simply and solely involves the issue of standing: whether or not these particular petitioners meet the constitutional and prudential tests that are required in order for them to pursue in the courts the allegations they have made in their complaint. The district court and the court of appeals concluded that they do not. And it is submitted that the conclusions reached by the lower courts are in accord with the requirements for standing enunciated by this Court and provide no basis for contending that review by the Court is warranted.

Petitioners are seven individuals who identify themselves as supporters of Senator Edward M. Kennedy, and who contend that the respondents' alleged activities devalue and dilute their support of his efforts to gain the Democratic Party nomination for President. Petitioners' broad-ranging complaint contains essentially three types of allegations: that senior Administration officials have carried out political activities at government expense; that federal employees have been improperly encouraged to support the President; and that federal grants to states and cities have been politically motivated.[1]

[1] Petitioners' grab bag of specific accusations includes such alleged "misdeeds" as: a Rhode Island Congressman, who does not support President Carter, was not invited on a flight aboard Air Force One (Complaint ¶20 (e)); invitations to the White House have been extended or withdrawn for political reasons (Complaint ¶20 (d)); White House briefings on public questions were conducted to generate support of the President's renomination (Complaint ¶20 (f)); the First Lady, Rosalyn Carter, only partially reimbursed the Treasury for portions of her expenses on mixed official and political trips (Complaint ¶18 (e)); and the President promised to maintain fuel supplies for residents of New Hampshire and Iowa (Complaint ¶51(d) and (e)). Moreover, in the section entitled "Facts" in their Petition, petitioners have recast the allegations in their complaint in even more strident terms, as well as wrung in an assortment of other unpleaded and exaggerated contentions.

Neither Senator Kennedy nor his campaign committee are petitioners. Also noticeably absent are federal employees allegedly coerced by respondents; local or state officials claiming improper diversions of grants from their jurisdictions, or indeed — with one insignificant exception[2] — anyone with any specific personal grievance whatsoever. Nor do the petitioners include any candidate allegedly denied access to the ballot, nor any voter allegedly denied the franchise, nor any campaigner allegedly restrained in his own political activities. Simply put, petitioners do not include any persons able to show the concrete, specific injury causally related to respondents' alleged acts that this Court has repeatedly made clear is required for standing.

Petitioners' complaint was filed on December 28, 1979. After briefing and oral argument, the district court on February 7, 1980 issued its Memorandum Opinion concluding that plaintiffs lacked both (l) the concrete, specific injury and (2) the causal relation between the alleged injury and defendants' acts, which are necessary for standing. (Mem. Op. 2-4.) In light of this determination, the district court concluded that "it is not necessary to discuss whether prudential limitations

[2] Petitioner Connery was allegedly slighted by not being invited to a White House function (Complaint ¶20 (c)).

would also bar plaintiffs' claims." (Mem. Op. 4.)

Petitioners appealed to the Court of Appeals for the District of Columbia Circuit, which on April 10, 1980, issued a unanimous opinion affirming the district court's decision, not only because of the absence of constitutional standing as determined by the district court, but also because of prudential limitations on standing. The court of appeals' decision is solidly premised on the requisites for standing as they have been enunciated by this Court; and as such it presents no issues that call for review.

Significantly, the Petition for Certiorari is virtually devoid of discussion of this Court's decisions on standing or the standing criteria set forth therein. Instead of addressing their standing, petitioners concentrate on the substantive issues they would wish to have determined by the courts. In doing so, however, petitioners ignore this Court's stricture that:

> [a] "fundamental aspect of standing" is that it focuses primarily on the *party* seeking to get his complaint before the federal court rather than "on the issues he wishes to have adjudicated."

United States v. *Richardson*, 418 U.S. 166, 174 (1974), *quoting from Flast* v. *Cohen*, 392 U.S. 83, 99 (1968).

In sum, petitioners are engaged in an exercise designed to divert attention from the fact that they do not meet the requirements for standing that this Court has repeatedly prescribed.

REASONS FOR DENYING THE WRIT

1. As indicated, the single issue in this case is the standing of the petitioners. The Court, in a series of cases decided over the last six years, has articulated

three requirements for standing, two of them constitutional and the third prudential.

First, plaintiffs must show a "distinct and palpable injury" to themselves, *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), which must be concrete and specific, not remote or speculative, *see*, *United States* v. *Richardson, supra,* 418 U.S. at 177-78 (1974), and which must involve quantifiable and measurable injury to their own personal interests and not to those of some third party or the public overall. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208, 217 (1974).

Second, plaintiffs also must show a "'fairly traceable' connection between the claimed injury and the challenged conduct," *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59, 72 (1978), *quoting Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977). Phrased another way, petitioners must show "that the exercise of the Court's remedial powers would redress the claimed injuries." *Duke Power* v. *Carolina Env. Study Group, supra,* 438 U.S. at 74; *see also, Simon* v. *Eastern Kentucky Welfare Rights Org., supra*, 426 U.S. at 43.

Third, plaintiffs also must satisfy the requirement of "prudential standing": that within the confines of judicial self-governance the court's action will maintain "the proper— and properly limited — role of the courts in a democratic society." *Warth* v. *Seldin, supra*, 422 U.S. at 498; *see also, Schlesinger* v. *Reservists Committee To Stop The War, supra*, 418 U.S. at 222.

The court of appeals determined that petitioners did not meet any of these requirements. That court's con-

clusion is in complete accord with, and compelled by, the decisions of this Court.

2. The soundness of the court of appeals' decision is so clear that on the issue of constitutional standing petitioners have been reduced to an argument premised on two serious mischaracterizations of the court of appeals' opinion.

Petitioners correctly note that the district court determined that they lacked both the requisite concrete injury to themselves[3] and the requisite causal connection between their claimed injury and the alleged acts of respondents. (Petition 11.) But petitioners then make the incorrect assertion that: "[T]he court of appeals rejected petitioners' standing on the causality ground alone. It did not affirm (and apparently rejected *sub silentio*) the district court's holding that petitioners had failed to show concrete injury at all (See, App. A 8a,11a)." (Petition 11.)

Yet at page 10a of its opinion, which is not cited by petitioners, the court of appeals stated:

> In sum, the district court concluded that the appellants had failed to show either injury in fact to themselves or a causal connection between the injury and the defendants' conduct. While *part* of the conduct complained of is a matter of public knowledge, the intent of the parties and the consequences of their acts upon appellants are open to question and wide speculation *and we agree with the conclusions of the district court.* (Second emphasis added.)

[3] In doing so, as the court of appeals noted (Appendix 9a), the district court distinguished *Baker* v. *Carr,* 369 U.S. 186 (1962), and its progeny, finding that those cases involved direct and concrete injury not present here. (Appendix 20a)

Clearly, the court of appeals agreed with *both* conclusions of the district court.

Similarly, petitioners erroneously contend (Petition 11-12, 15-16) that the court of appeals created a "guaranteed success test" (Petition 16), holding that to meet the causality requirement for standing petitioners "must show that their preferred candidate would win nomination *but for* defendants' illegal conduct." (Petition 15.) This is incorrect. At page 11 of the Petition, petitioners extract a clause from the court of appeals' decision without quoting the full sentence. They then attempt to construct an argument that the court below has developed an unprecedented requirement for standing.

Thus, they contend that the court of appeals characterized their injury as lying in "'the outcome of state presidential primary elections, caucuses and conventions'" (Petition 11 *quoting* the court of appeals at Appendix 11a-12a), and that the court required them to show that that "outcome" would necessarily be in favor of their candidate but for respondents' alleged conduct. (Petition 15.) The court's complete sentence from which this phrase is taken, however, makes clear not only that this phrase was not a characterization of petitioners' injury, but also that no "guaranteed success test" was contemplated:

> The endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that *voter support* of a candidate is "fairly traceable" to any particular event.

(Appendix 11a-12a) (emphasis added).

Indeed, the court's opinion makes clear that it considered the issues before it in terms of whether the

respondents' alleged activities had an influence on voters sufficient to cause petitioners to suffer the alleged "dilution of their efforts on Senator Kennedy's behalf" (Appendix 10a) that forms the basis of their complaint. Clearly, the court decided that the factors that may influence an individual voter are so diverse that it could not conclude that the requisite causal relation existed between voters' decisions and the respondents' alleged activities.

In short, when fairly read, the opinion of the court of appeals (l) affirms the district court's finding of lack of concrete injury, as well as its finding of a lack of causal relation, and (2) does not impose a "guaranteed success test" with respect to causal relation.

3. Petitioners' argument with respect to the court of appeals' finding on prudential standing is similarly misplaced.

The Court concluded that granting the relief requested by petitioners would place the court

> in the position of evaluating every discretionary consideration, including those which result in a decision not to take a particular action, for traces of political expediency. This would necessarily require the court to determine how the particular matter would be resolved if detached from the political consequences to President Carter's renomination efforts. As the factual statement to this opinion reflects, the sweeping breadth of the complaint would require correspondingly broad relief. The courts are not suited to undertake a neutral consideration of every Executive action, ranging from White House invitations and space reservations on the Presidential aircraft to the decision to award funds to a particular state or other political subdivision for general or specific projects.

(Appendix 14a-15a) (footnote omitted).

Petitioners contend (Petition 18) that this "'prudential' reasoning" would "immunize the federal government from the reach of" the decisions in *Elrod* v. *Burns*, 427 U.S. 347 (1976), *Branti* v. *Finkel*, _____ U.S. _____ (1980), and *Illinois State Employees Union* v. *Lewis*, 473 F. 2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). This is not the case. The *Elrod*, *Branti*, and *Illinois State* cases involved allegations by public employees *themselves* that their own dismissals from public office were improperly based on political considerations. In those cases, the plaintiffs' threatened injuries were clear, their perpetrators were readily identifiable, and the judicial relief requested was narrow and straightforward. These cases simply highlight the lack of such characteristics here. Clearly, by also dismissing this case on prudential standing grounds, the court of appeals was not immunizing the federal government from judicial intervention where manageable claims have been asserted by the proper parties (*see*, Appendix 5a n. 6 and 15a n. 31).

Further, after constructing this "straw man" of immunization of the federal government, petitioners attempt to discredit it by citing a series of cases in which this Court countermanded a specific Presidential decision or in which a lower court inquired into whether political motivation affected a particular decision by an Executive Branch official. (Petition 16-17 nn. 14 & 16.) In each case cited by petitioners, however, the plaintiffs alleged a specific violation of law and sought specific relief to reverse that precise action.[4] Again, the contrast

[4] Thus, each of this Court's decisions cited at footnote 14 of the Petition involved precisely focused allegations of a specific wrongful action as to which appropriate relief could be fashioned: *United States* v. *Nixon*, 418 U.S. 683 (1974) (relief sought: enforcement or quashing of subpoena concerning Presidential tape recordings); *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977) (relief sought: invalidation of Presidential Recordings and Materials Preservation Act); *Humphrey's Executor* v. *United States*,

with this case is marked, as here the court would be required to assume a role of continuing overseer of the Executive Branch. Thus, the cases cited by petitioners do not support a grant of certiorari here.

4. Petitioners, straining to find a conflict between circuits as a basis for a grant of certiorari, also contend that the decision of the court of appeals in this case "squarely conflicts" with *Shakman* v. *Democratic Organization of Cook County*, 435 F. 2d 267 (7th Cir. 1970). (Petition 20) But *Shakman*, which contained no meaningful discussion of standing, was decided in 1970,

295 U.S. 602 (1935) (relief sought: determination that Federal Trade Commission Act lawfully restricted Presidential ability to remove a Commission member); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (relief sought: injunction prohibiting Presidential seizure of steel mills); and *Train* v. *City of New York*, 420 U.S. 35 (1975) (relief sought: order that the Environmental Protection Agency allot the full grants authorized by the Federal Water Pollution Control Act). Similarly, none of the cases cited by petitioners at footnote 16 has relevance to this case. They involve either a suit against a member of the Executive Branch (and have no other pertinence to the issues raised in this case) or a contention that excessive political pressure influenced a particular action by a public official. None involve the sweeping judicial intervention into the full gamut of Executive decision-making such as is demanded by petitioners here.

Petitioners also suggest (Petition 13 n. 11) that the court of appeals would not have relied on petitioners' lack of prudential standing as a ground for dismissal if the allegations of the complaint had involved racial discrimination. But this case stands in sharp contrast to discrimination cases, where the Constitution by its terms prohibits the intrusion of racially discriminatory considerations into public decision-making. Here, unlike racial discrimination cases, the relief requested by petitioners would compel the court "to undertake a *neutral* consideration of every Executive action" (Appendix 15a) (emphasis added). In racial discrimination cases, there is no weighing of public policy against discrimination; there is no "neutrality." The Constitution is unequivocal in its ban on any form of racial discrimination, and would make the task of a court very different from that here, where the court's inquiry could not "proceed on the basis of a discrete judicial standard." (Appendix 14a n. 30.)

when it was generally believed that the concept of standing had "been almost completely abandoned." *Reservists Committee To Stop The War* v. *Laird*, 323 F. Supp. 833, 839 (D.D.C. 1971), *reversed sub nom. Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208 (1974). As the court of appeals noted (Appendix 15a n. 32), this Court, in a series of cases subsequent to *Shakman*, has rearticulated and reemphasized the requirements for standing. Indeed, this Court's renewed focus on standing was recognized by the Seventh Circuit in its 1977 decision in *Mulqueeny* v. *National Commission on the Observance of International Women's Year*, 549 F. 2d 1115 (7th Cir. 1977) (dismissing for lack of standing a suit by opponents of the Equal Rights Amendment who claimed to have been competitively disadvantaged in their support of the ERA by the allegedly illegal lobbying activities of the National Commission, a federally funded organization). In light of *Mulqueeny*, it is highly doubtful that *Shakman* remains good law today even in the Seventh Circuit. In short, *Shakman* presents no real conflict between the circuits.[5]

5. Finally, petitioners conclude their argument as they began it, with grandiose claims that the decision below leaves "basic political rights without a remedy" and "our constitutional scheme defenseless." (Petition 15, 22.) This Court responded to this type of contention

[5] Petitioners seek to resuscitate *Shakman* through reference (Petition 20-21) to a footnote in Mr. Justice (then Circuit Judge) Stevens' 1972 opinion for the Seventh Circuit in *Illinois State Employees Union* v. *Lewis, supra*, 473 F.2d at 569 n. 17, and to a footnote in Mr. Justice Powell's dissent in *Elrod* v. *Burns, supra*, 427 U.S. at 382 n. 5. In both instances, however, the plaintiffs were threatened or discharged employees and the footnote references to *Shakman* adverted to its inapplicability to the issues before the court.

when it stated in *United States* v. *Richardson*, *supra*, 418 U.S. at 179:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.

See also, Schlesinger v. *Reservists Committee To Stop The War, supra,* 418 U.S. at 227. Moreover, whether other potential plaintiffs could have established standing to pursue the type of allegations in petitioners' complaint is not in issue here. Finally, as the court of appeals suggested (Appendix 17a n. 34), there exist other vehicles for the examination of such types of allegations.[6] Thus, the court of appeals' reasoned finding that petitioners lack standing does nothing to undermine our constitutional scheme of government; it adheres to it.

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[6] For example, an incumbent President's campaign is subject to the contribution and expenditure limitations, the disclosure and reporting requirements, and other strictures of the Federal Election Campaign Act of 1971, as amended, and of the Federal Election Commission. 2 U.S.C. §431 *et seq.;* 11 C.F.R. §§100-115, 9032-9038 (1977). Indeed, FEC Regulations apply to such matters as the appropriate method for allocating costs between the governmental and campaign-related portions of combined official and political travel (11 C.F.R. §106.3), issues which are adverted to in the complaint. Further, expenditures from appropriated funds and other uses of government resources by White House employees and Cabinet Secretaries are subject to review by the Comptroller General and the General Accounting Office, 31 U.S.C. §53; 3 U.S.C. §105(d), and to Congressional oversight. Moreover, each of the federal grant or jobs programs which petitioners mention in their complaint is subject to specific statutory criteria established by Congress, to internal department audit (*see,* Inspector General Act of 1978, Pub. L. No. 95-451, 92 Stat. 1101 (1978)) and to Congressional oversight. White House employees are subject, under the Civil Service Reform Act of 1978, 5 U.S.C. §§1201,1206, to investigation and prosecution by the special counsel of the Merit Systems Protection Board for any political misuse of official authority in violation of 5 U.S.C. §7324(a)(1), and are subject to regulations enforced by the Office of Government Ethics concerning employee conduct and the use of federal property, *see,* Executive Order 11222; 5 C.F.R. §735.202; 3 C.F.R. §100.735. In addition, with regard to any criminal violations such as those contained in 18 U.S.C. §591 *et seq.* (Federal Corrupt Practices Act), all high-ranking Administration officials are subject to the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be denied.

Respectfully submitted,

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